

The Administrative Law Judge denied claimant's request for temporary total and medical benefits. The claimant requests the Appeals Board review the preliminary finding of the Administrative Law Judge that claimant's accidental injury did not arise out of and in the course of his employment with the respondent. That is the sole issue now before the Appeals Board.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the entire record, for purposes of preliminary hearing, the Appeals Board finds, as follows:

Claimant has established it is more probably true than not that the accidental injury of February 5, 1994, arose out of and in the course of his employment with the respondent. Therefore, the preliminary finding of the Administrative Law Judge to the contrary should be reversed.

On February 5, 1994, claimant was injured when the company truck he was driving slammed into the rear of another truck that was stalled on a highway near claimant's home. At the time of the accident, claimant was returning home to obtain his company credit card to purchase gasoline for the truck.

Although the parties focused on the question whether claimant, one of respondent's service technicians, was scheduled to answer service calls on the weekend of the accident, the determinative question is whether claimant was in the process of obtaining gasoline for his company truck when the accident occurred. Claimant testified unequivocally he was taking the truck for refueling when he discovered he did not have the company credit card and was returning home to retrieve the card when the accident occurred. Respondent contends that claimant could not have been on his way to refuel the truck because (1) claimant's wife and granddaughter were in the truck and (2) claimant had refueled one and one-half days earlier.

In light of the record as a whole, the Appeals Board finds claimant's testimony to be credible whereas respondent's contentions remain in the realm of speculation and conjecture. The fact that claimant's wife and granddaughter were in the truck at the time of the accident is not strong evidence to controvert claimant's testimony. Likewise, the contention claimant's truck did not need refueling at the time of the accident is not supported by the evidentiary record.

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that claimant has established the accident of February 5, 1994, arose out of and in the course of his employment with the respondent, and, therefore, the preliminary finding of the Administrative Law Judge to the contrary should be, and hereby is, reversed. The Appeals Board further orders this case remanded to the Administrative Law Judge for appropriate findings and order based upon the evidence introduced to date regarding any other issues pertaining to claimant's request for benefits. The Appeals Board does not retain jurisdiction over this proceeding.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of January, 1995.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Dale E. Bennett, Attorney at Law, Overland Park, KS  
Mark Hoffmeister, Attorney at Law, Overland Park, KS  
Robert H. Foerschler, Administrative Law Judge  
George Gomez, Director

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**THOMAS NEWTON**  
Claimant

VS.

**DUGAN EQUIPMENT AND SUPPLY COMPANY**  
Respondent

AND

**HARTFORD ACCIDENT AND INDEMNITY**  
Insurance Carrier

Docket No. 187,557

## ORDER

On November 8, 1994, the Appeals Board heard arguments in claimant's request to review the Preliminary Hearing Order of Administrative Law Judge Robert H. Foerschler, dated August 31, 1994.

## APPEARANCES

Claimant appeared by his attorney, Dale E. Bennett of Overland Park, Kansas. Respondent and its insurance carrier appeared by their attorney, Mark Hoffmeister of Overland Park, Kansas. There were no other appearances.

## ISSUES

The Administrative Law Judge denied claimant's request for temporary total and medical benefits. The claimant requests the Appeals Board review the preliminary finding of the Administrative Law Judge that claimant's accidental injury did not arise out of and in the course of his employment with the respondent. That is the sole issue now before the Appeals Board.

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

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Although the parties focused on the question whether claimant, one of respondent's service technicians, was scheduled to answer service calls on the weekend of the accident, the determinative question is whether claimant was in the process of obtaining gasoline for his company truck when the accident occurred. Claimant testified unequivocally he was taking the truck for refueling when he discovered he did not have the company credit card and was returning home to retrieve the card when the accident occurred. Respondent contends that claimant could not have been on his way to refuel the truck because (1) claimant's wife and granddaughter were in the truck and (2) claimant had refueled one and one-half days earlier.

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**IT IS SO ORDERED.**

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Mark Hoffmeister, Attorney at Law, Overland Park, KS  
Robert H. Foerschler, Administrative Law Judge  
George Gomez, Director